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IN THE

Supreme Court of the United States

October Term, 1950

No. 235

CHICAGO AND SOUTHERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*
RESORT AIRLINES, INC., *Intervener.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY OF PETITIONER TO BRIEFS IN OPPOSITION.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner and presents this reply to the briefs in opposition to the petition for a writ of certiorari filed in this case.

JURISDICTION.

The petition for a writ of certiorari was filed on August 4, 1950 and briefs in opposition were filed, one on and one

before, September 6, 1950. This reply is filed in timely manner, in accordance with Rule 38 of this Court.

STATEMENT.

Intervener in the court below (R. 63) and in its brief in opposition (p. 11) contends that judicial review of the petition for review is precluded bythe fact that the petition was not filed within sixty days of the entry of the Board's order as required by Section 1006 (a) of the Civil Aeronautics Act [49 USC 646 (a)]. Both respondent and intervener in the court below (R. 62 & 63) and in their briefs in opposition contend that judicial review is precluded by the fact that petitioner did not raise the questions and objections raised in its petition for review before the Civil Aeronautics Board. The lower court did not rule on either of these contentions, but dismissed the petition for review on other grounds (R. 72). Because the respondent and the intervener have renewed these contentions in their briefs in opposition to the petition for a writ of certiorari, petitioner herewith summarizes the arguments presented by it on these questions in the court below. The detailed arguments presented to the court below is contained in the record before this Court (fol. 673-680, 700-707) but is not in the printed transcript.

ARGUMENT.

1. The Petition for Review Was Filed Within Sixty Days After the Entry of the Order of the Civil Aeronautics Board as Required by Section 1006 (a) of the Civil Aeronautics Act.

Intervener in its brief in opposition (p. 11) contends that judicial review is precluded because the petition for review, which was filed August 8, 1949, sixty days after the President approved the Board's order on June 9, 1949, was not filed "within sixty days after the entry of such order" as required by Section 1006 (a) of the Civil Aeronautics Act.

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The Board's decision was made on June 1, 1949 "subject to the approval of the President" (fol. 721). The order of June 1, 1949 (R. 42) was approved by the President on June 9, 1949 (R. 43). Section 801 of the Civil Aeronautics Act (Pet. 23) prohibits publication of such an order until it has been approved by the President. No rights or duties flowed from the Board's order on June 1, 1949 because it required Presidential approval to become effective. Prior to that time it was only a "recommendation."[1]

The Intervener contends (p. 11) that although the period within which to file was reduced by eight days because the President did not approve until June 9, 1949, more than sufficient time still remained in which to file the petition for review. To place such a strained construction upon the meaning of Section 1006 (a) of the Act not only ignores the obvious meaning of the section when read in the light of Section 801, but also introduces an unintended element of uncertainty and destroys the petitioning party's statutory right of review. A very cursory survey of cases before the Board reveals that the Intervener's interpretation would have the effect of changing the period within which to file from the 60 days prescribed by the statute to a period varying from 59 days to 2 days depending upon the unknown contingencies of the case.[2] In many instances Presidential approval has not attached until more than 60 days after the Board has adopted the order subject to the approval of

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[1] *Chicago & Southern Air Lines, Inc.*, v. *Waterman Steamship Co.*, 133 U. S. 103, 109 (1948).

[2] *Pacific Northwest-Hawaii Case*, 9 C. A. B. 580, decided October 1, 1948, approved October 2, 1948, elapsed time: 1 day.

Hawaiian Airlines Ltd.,—Certificate Amendment, 10 C. A. B. 100 decided February 21, 1949, approved March 22, 1949, elapsed time: 29 days.

Boston-Bermuda Case, 9 C. A. B. 563, decided September 2, 1948, approved October 21, 1948, elapsed time: 49 days.

Caribbean Area Case, 9 C. A. B. 534, decided July 20, 1948, approved September 15, 1948, elapsed time: 58 days.

the President.[3] Nor is it a solution to suggest, as the Intervener has done (p. 12), that in cases of substantial delay the Petitioner may ask leave of court to file the petition for review under the last sentence of Section 1006 (a). Such a construction would deny the absolute right to review conferred by Section 1006 (a) and would substitute in its place a permissive right subject to the discretion of the court.

The only reasonable interpretation of Section 1006 (a) of the Act must be that "entry of the order" means the effective date of the order. In cases which must be presented to the President for his approval in conformity with Section 801, that section expressly prohibits even the publication of the order until Presidential approval has attached. Petitioner did not and could not have known of the Board's order of June 1, 1949, until after the President approved the order on June 9, 1949. The latter date must be held to be the one from which the sixty day period starts to run. To hold otherwise would mean that when the President approved the order it became an order as of a prior date, that is, on June 9 the order became an order as of June 1, a *nunc pro tunc* order. Such a holding would reverse the early holding of this Court, never departed from, that the date of the final order appealed from is the determinative date and that the date can not relate back to a prior date to shorten the appeal period authorized.[4]

The Circuit Court of Appeals for the District of Columbia Circuit, in construing "entry of such order" in Section 1006 (a) of the Act, has held that the filing of a petition for reconsideration has the effect of tolling the sixty day period and that the period does not start to run until the date on which the Board denies the petition for reconsidera-

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[3] *Pacific Northwest-Hawaii Service Case* 9 C. A. B. 414, decided March 16, 1948, approved July 29, 1948, elapsed time: 135 days.
Hawaiian Intraterritorial Service, 10 C. A. B. 62, decided November 29, 1948, approved February 17, 1949, elapsed time: 79 days.

[4] *Providence Rubber Co.* v. *Charles Goodyear, Executor*, 6 Wall 153, 18 L. Ed. 762.

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tion.[5] If the filing of a petition for reconsideration has the legal effect of tolling the 60 day appeal period, then *a fortiori* the time required to obtain Presidential approval of the Board's recommended order tolls the appeal period. In the former case, the aggrieved party had complete knowledge of the order adopted by the Board adversely affecting it. The order was entered, was final, and was legally binding. No information of any kind necessary to take an appeal was needed, and yet the Court construed the language of Section 1006 (a) in such a way as to delay starting the 60 day period to a time after the original entry of the order complained of. In the instant case, the order of June 1, 1949 was not final. It was specifically made subject to approval by the President. It was not made known to Petitioner or to the public generally, except after Presidential approval had been obtained. It was withheld from public disclosure.

Even if the court should agree with the Intervener's technical interpretation of the 60 day provision in Section 1006 (a), it is clear that Petitioner falls within the exception of Section 1006 (a), and that Petitioner had reasonable grounds for failure to file its petition on July 31, 1949 instead of on August 8, 1949. The particular question presented by the Intervener's "timeliness" argument has never been decided by any court and Petitioner submits that, under such circumstances, it had reasonable grounds for assuming the 60 day period began to run after Presidential approval had been obtained and when the Board for the first time published its order and thereby advised Petitioner for the first time that it was aggrieved.[6]

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[5] *Braniff Airways, Inc.*, v. *Civil Aeronautics Board*, 147 F. (2d) 152 (1945).

[6] Petitioner did not and does not admit that Intervener's contention that the 60 day period started to run from June 1, 1949 has any merit. However, in order to resolve any possible question, Petitioner in its answer to Intervener's motion to dismiss in the court below requested special leave of court, pursuant to Section 1006 (a), to the extent that such special leave was deemed necessary.

2. The Fact That Petitioner Did Not Raise Before the Civil Aeronautics Board the Objections Raised in Its Petition for Review Does Not Preclude Judicial Review.

Section 1006(e) of the Act provides that:

> "No objection to an order of the [Board] shall be considered by the court unless such objection shall have been urged before the [Board], or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Respondent and intervener contend that under the foregoing language petitioner was required to file a petition for reconsideration and raise its objections before the Board before applying for judicial review.

It is a sufficient answer to this contention to cite Section 10(c) of the Administrative Procedure Act and the case of *Levers* v. *Anderson*, 326 U. S. 219 (1945). The *Levers Case* was decided before the enactment of the Administrative Procedure Act but follows the rule first laid down in *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43 (1923), and *United States* v. *The Abilene & Southern Ry. Co.*, 275 U. S. 274 (1924). From the decision of the Supreme Court in the *Levers Case*, it is clear that judicial review will not be denied merely because the petitioner did not seek a rehearing before the administrative agency, especially where the right to rehearing before the agency is permissive and not mandatory. In the *Levers Case* the Court relied in large measure upon the permissive language of the regulation involved, which permitted rehearing, and the fact that judicial review was provided in the Federal Alcohol Administration Act itself. The same points can be made with respect to the present case. Section 1006(a) of the Civil Aeronautics Act provides an absolute right to judicial review of the orders of the Board by the Circuit Courts of Appeals. The Rules of Practice of the Board provide that an application for reconsideration of any final order of the Board *may* be filed with the Board (14 C.F.R., Sec. 285.11).

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In both the *Levers Case* and in the instant case the right to judicial review was given by the statute. Similarly, in both cases the right to reconsideration was a permissive right granted by the agency. In both cases a final order of the agency was involved with no further action by the agency contemplated.

Section 10(c) of the Administrative Procedure Act provides in part as follows:

> "Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

This section of the Administrative Procedure Act codifies the rule of the *Levers Case.*

The cases cited by respondent and intervener are distinguishable from both the present case and the *Levers Case.* In all those cases some further development, some further hearing, or some further action growing out of the order complained of had been contemplated by the administrative agency involved at the time the aggrieved party sought to take his appeal to the courts. No such action is involved here. The Board's order of June 9, 1949 was final and no further action by the Board or by the President was contemplated.

Section 1006(e) is not an unusual provision. It merely incorporates into the Civil Aeronautics Act a well recognized general rule that an appellate court will not undertake to review matters which were not raised below. However, this rule has no applicability to the type of objections made by petitioner and which could not have been raised at any time during the proceedings before the Board. As this case was proceeding through the various procedural steps before the Board prior to decision, petitioner had the

right to assume that when Presidential approval to the Board's decision was finally obtained under Section 801 of the Act, the President would act within the scope of the authority vested in him by Section 801 and would not exceed it as alleged. Accordingly, there was no opportunity for petitioner to raise its objections until after the Board's Order, approved by the President, had been issued. Petitioner had no way of knowing at the time this proceeding was pending before the Board that the President would exceed the authority vested in him by Section 801. The issues raised by petitioner were nonexistent at that time. They became issues only after the Board issued its final order of June 9th, in which it issued a certificate to Resort pursuant to Presidential direction. In the recent case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416 (1947), where a similar contention was advanced under a similar statutory provision limiting review, the Supreme Court said:

> "But the provision of section 10(e), that 'No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances,' quite obviously refers to objections that might have been but were not raised in the original proceeding before the Board. * * * [The issue raised on review] was thus a matter which could not have been raised before the Board. And the failure of respondent to raise the then nonexistent issue before the Board could not deprive the court below of the power to consider the issue once it did come into existence." pp. 427-428.

In any event, whether Section 1006(e) is held to cover the type of objections raised by petitioner or not, it should be recognized that Section 1006(e) specifically contemplates that there may be situations where matters might not be raised before the Board but which might be raised on judicial review. Section 1006(e) has a specific exception to

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cover a case where there might be reasonable grounds for failure to raise objections before the Board before applying for judicial review. Assuming arguendo that petitioner's objections are the type of objections contemplated by Section 1006(e), then petitioner urges that the unusual nature of these objections which raise questions as to the scope of Presidential power under Section 801 and the fact that it was the President who directed the Board to issue the certificate to Resort in spite of the Board's findings adverse to Resort, provide reasonable grounds for petitioner's failure to raise these objections with the Board before applying for judicial review.

Respectfully submitted,

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September 13, 1950.